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# Supreme Court of the United States

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JANICE FAY FAIRCLOTH, EVELYN D. FREDERICK,
CALLWEALL W. SMILING,

*Petitioners*,

v.

THE LUNDY PACKING COMPANY,
ANNABELLE L. FETTERMAN, MABEL F. HELD,
TRUSTEES LUNDY PACKING COMPANY
STOCK OWNERSHIP PLAN, AND JOHN DOES,

*Respondents*.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, contrary to the holdings of the Sixth Circuit and Ninth Circuit in banc, the Fourth Circuit correctly held that the documents required to be provided to employee benefit plan participants under Sections 104(b)(4) and 404(a)(1)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") exclude basic plan documents necessary to determine the value of their benefit, their tax liability, and whether their plan is being administered in accordance with the bonding requirements of ERISA.

## LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Janice Fay Faircloth, Evelyn D. Frederick, and Callweall W. Smiling, as participants in Lundy Packing Company Employee Stock Ownership Plan ("Plan"), and the Respondents, The Lundy Packing Company as Plan administrator and the named fiduciary of the Plan, and Annabelle L. Fetterman and Mabel F. Held as Plan Trustees and fiduciaries and John Does.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 91 F. 3d 648. The opinions and judgement of the District Court for the Eastern District of North Carolina are unreported. All of the opinions, including the appellate court's unreported denial of Petitioners' suggestion for rehearing in banc, are reproduced in the Appendix.

## JURISDICTION

The opinion of the Court of Appeals was entered on August 2, 1996. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

Sections 104(b)(4) and 404(a)(1)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, et seq., are the primary statutory provisions at issue in this case. Section 104 (b)(4) provides:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

Section 404 (a)(1)(A) provides:

> Subject to section 403(c) and (d), 4042 and 4044 [concerning plan terminations] a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants; and beneficiaries; and

(ii) defraying reasonable expenses of administering the plan.

The following ERISA provisions also are pertinent to this matter.

ERISA Section 3(3), 29 U.S.C. § 1002(3)

ERISA Section 3(16), 29 U.S.C. § 1002(16)

ERISA Section 3(21), 29 U.S.C. § 1002(21)

ERISA Section 104(b)(4), 29 U.S.C. §1024(b)(4)

ERISA Section 402(a), 29 U.S.C. § 1102(a)

ERISA Section 412(a), 29 U.S.C. §1112(a)

ERISA Section 502(c)(1), 29 U.S.C. §1132(c)(1).

ERISA Section 502(e)(1), 29 U.S.C. §1132(e)(1).

The full text of these provisions appears in the Appendix hereto.

## STATEMENT OF THE CASE

### 1. The Factual Background

Petitioners Janice Fay Faircloth and Evelyn D. Frederick are employees of the Lundy Packing Company ("Lundy"). Petitioner Callwell W. Smiling is a former employee of Lundy. All of the Petitioners are participants in the Lundy Packing Company Stock Ownership Plan ("Plan" or "ESOP"). The ESOP is an employee benefit plan within the meaning of ERISA Section 3(3). Appellee Lundy, is the "plan administrator" within the meaning of ERISA Section 3(16), and

the "named fiduciary" within the meaning of ERISA Section 402(a). Respondents Annabelle L. Fetterman and Mabel F. Held are employees of Lundy and Trustees of the Plan. They are also fiduciaries of the Plan within the meaning of ERISA Section 3(21).

Petitioners Faircloth, Frederick and Smiling received statements from Lundy indicating that the value of their benefits under the Plan had dropped by 42% from June 29, 1991 to July 4, 1992. Petitioners were informed that the reason for the precipitous decline in the value of their account was because Respondents had valued Lundy stock at only 58 percent of the value assigned to it in the prior Plan year. Virtually all of the assets of the Plan are invested in Lundy stock.

Concerned for the safety of their retirement income, Faircloth, Frederick and Smiling requested in writing on March 23, 1993 that the Lundy plan administrator provide them with a number of documents regarding the Plan. The requested documents included the bond covering the Plan or its fiduciaries required by ERISA Section 412 and the last Internal Revenue Service determination of tax qualification for the Plan. Among the other documents requested, were contracts between the Plan and its asset custodians and investment managers. The letters further requested that Respondents provide all of the requested documents within 30 days as required by ERISA Section 502(c)(1). By letter dated April 19, 1993, Respondents refused to provide the requested documents.

In an effort to discover whether Lundy had accurately valued their accounts, Petitioners requested by letter dated May 25, 1993 that the plan administrator provide them with a copy of the stock appraisal used to value the stock owned by the Plan so that they might learn the basis by which the value of their benefits were measured. Petitioners also requested copies of

financial documents upon which the stock appraisal was based. These were also refused.

### 2. The Proceedings Below

#### a. The Complaint

Petitioners filed their complaint on May 27, 1993 seeking to enforce Respondents' disclosure obligation when Respondents did not provide the documents requested on March 23, 1993. The complaint was filed pursuant to ERISA Section 502(e)(1) which provides that the district courts of the United States have exclusive jurisdiction over civil actions by plan participants or beneficiaries under Title 1 of ERISA. The complaint, *inter alia,* seeks disclosure under ERISA Section 104(b)(4) of all of the documents that Petitioners requested. The complaint also alleges that failure to provide the requested documents constitutes a breach of Respondents' fiduciary duty under ERISA Section 404(a)(1)(A) to discharge their duties solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries.[1]

When Lundy notified Petitioners by letters dated June 18, 1993 that it refused to furnish the documents requested in Petitioners' May 25, 1993 letter, Petitioners filed an Amended Complaint on July 21, 1993, adding a count demanding the documents requested in their second information request.

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[1] In addition, the complaint alleges that Respondents violated ERISA Section 404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D), which requires that plan fiduciaries discharge their duties in accordance with the documents and instruments governing the plan. The basis for the allegation is that Respondents' failure to provide documents violated the terms of the Plan's Summary Plan Description. Petitioners are not seeking review of the Fourth Circuit rulings on these claims.

### b. The Order of the District Court

The parties filed cross-motions for summary judgment below. The District Court ruled on Respondents' motion on October 12, 1994. In that Order, the District Court interpreted the "catch all" phrase in ERISA Section 104(b)(4) requiring the disclosure to participants of "other instruments under which the plan is established or operated." The Court concluded that the provision in question required disclosure of all "documents identified by the statute, and which in a legally operative manner, either establish or provide direction for the operation of the plan." According to the District Court, the bond policy, IRS determination letter, and the appraisal reports and supporting financial documents therefore were outside the scope of disclosure required by Section 104(b)(4). The District Court concluded that ERISA Section 404(a)(1)(A) did not require disclosure of these documents either. By order dated January 20, 1995, the District Court ruled on Petitioners' Motion for Summary Judgment, concluding that the fiduciary insurance policy and contracts between the Plan, the custodian of assets, and the investment manager are documents that must be furnished under ERISA Section 104(b)(4).

### c. The Decision of the Fourth Circuit

The Fourth Circuit (Michael, J. concurring in part, dissenting in part) affirmed in part and reversed in part, the judgment of the District Court. The majority declined to adopt the District Court's definition of the scope of disclosure required under Section 104(b)(4). It also determined not to adopt the definition of the scope of disclosure under Section 104(b)(4) that was annunciated by the Sixth Circuit in *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994) or the Ninth Circuit sitting in banc, in *Hughes Salaried Retirees Action Committee v. Administrator of Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686 (9th Cir. 1995), *cert. denied*,__

U.S._, 116 S. Ct. 1676, 134 L.Ed. 2d 779 (1996) Appendix at 7a-10a. The majority instead created it own standard, which limited the scope of disclosure under the provision to "formal or legal documents under which the plan is set up or managed." Appendix at 7a. It then, purporting to apply this standard, affirmed the District Court's holding that disclosure under Section 104(b)(4) did not encompass such formal and legal documents as the stock appraisal report and supporting financial information, the Plan's Internal Revenue Service determination letter, and the bonding insurance policy protecting the Plan against the dishonesty of Plan fiduciaries. Appendix at 11a.

The Fourth Circuit held that disclosure of plan information required by Section 404(a)(1)(A) was, at best, coextensive with that required by Section 104(b)(4). Thus, it concluded that Respondents were not under a fiduciary obligation to disclose this information about the Plan to Petitioners. Appendix at 14a-19a.

In tandem with its refusal to give Petitioners access to the basic Plan documents described above, the panel reversed the District Court's holding that the funding and investment policies need not be produced. Appendix at 14a.

In a well-reasoned dissent,[2] Judge Michael disagreed with the majority's conclusion that the ESOP stock appraisal, the supporting financial information on which that appraisal was based, the Internal Revenue Service determination letter, and the bond required to be maintained under ERISA Section 412(a) all were outside the scope of disclosure required by Section 104(b)(4). Appendix at 23a. Judge Michael concluded

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[2]Judge Michael concurred with the majority's conclusion that ERISA Section 404(a)(1)(A) did not extend the disclosure obligation beyond that required under ERISA Section 104(b)(4).

that the IRS determination letter was an instrument under which the Plan was operated since it establishes whether the Plan has to pay taxes on its earnings, whether contributions to the Plan are tax deductible by Lundy, and whether employees are taxed currently on the contributions made by Lundy on their behalf. Appendix at 32a-33a. Judge Michael also expressed the view that the fiduciary bond must be disclosed because fiduciaries must be bonded under ERISA Section 412(a) and "the Plan cannot operate without fiduciaries." *Id.*

Addressing the question of whether the ESOP stock appraisal and supporting financial information must be disclosed, Judge Michael expressed his view that ERISA mandated disclosure of all information necessary for ESOP participants to determine whether the sponsoring employer is buying stock and selling stock at a fair price in transactions with the ESOP. Appendix at 31a. He recognized that it is in a sponsoring employer's interest to buy shares from the ESOP "cheap" and sell them to the ESOP "dear" and that such manipulation of the stock price endangers the retirement benefits of the ESOP participants and beneficiaries. *Id.* Under such circumstances, he stated, disclosure of information necessary to verify the accurate valuation of the stock is required under Section 104(b)(4) in order to enable participants to protect their benefits against wasting by the employer through abuse of the appraisal process: "[w]hen the same people manage both the ESOP and the sponsoring company, as in this case, employees need to know that share prices have not been manipulated for the benefit of the sponsor" and to the detriment of the ESOP participants and beneficiaries. *Id.* Judge Michael opined that, because an accurate valuation of the shares is "absolutely critical to the Plan's operation," the appraisal and supporting financial information is clearly an

"instrument" under which the Plan is "operated." Appendix at 32a.[3]

## REASONS FOR GRANTING THE WRIT

Petitioners seek a writ of certiorari to the court below because of the great importance of this case to ERISA employee benefit plans of all types, their participants, sponsors, administrators and trustees. It is essential that participants, sponsors, administrators, and trustees know clearly the extent of their obligations under Sections 104(b)(4) and 404(a)(1)(A) of ERISA to disclose plan information. Before the Fourth Circuit issued its opinion in this matter, the Circuit Courts of Appeal applied two different statutory interpretations in determining what documents must be provided by plan administrators upon request by participants. Now, there are three. Consequently, plan administrators and plan sponsors are operating under unknown rules that may vary depending on where their offices or participants are located. If they refuse to provide documents in response to a participant request they run the risk of penalties of $100 a day under ERISA Section 502(c)(1). The current morass is directly inconsistent with ERISA's goal of national uniformity. *See Ingersoll Rand Co. v. McClendon,* 498 U.S. 133, 142, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). Participants in the Fourth Circuit now find themselves entitled to less information than that available to participants residing in the Sixth and Ninth Circuits even though they may be participants in the very same plan.

If the Fourth Circuit decision stands, participants in that Circuit will be unable to obtain the information that they need to determine whether they are receiving the retirement benefits they earned. Moreover, they will be unable to determine if

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[3]On August 30, 1996, the Fourth Circuit denied the Petitioners' suggestion for rehearing in banc. Appendix at 37a.

their plan is adequately protected against the dishonesty of those who handle its assets or whether they are actually entitled to defer taxes on their retirement benefits.

### A. The Fourth Circuit's Holding Below Directly Conflicts with Decisions of the Sixth and Ninth Circuits

As the Fourth Circuit majority itself concedes, its narrow construction of ERISA Section 104(b)(4) is in direct conflict with the holding of the Sixth Circuit in *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994). Moreover, It conflicts with the in banc Ninth Circuit's decision in *Hughes Salaried Retirees Action Committee v. Administrator of Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686 (9th Cir. 1995), *cert. denied.* _U.S._, 116 S.Ct. 1676, 134 L. Ed. 2d 779(1996).

In *Bartling*, the Sixth Circuit held "that, all other things being equal, courts should favor disclosure where it would help participants understand their rights." *Bartling*, 29 F.3d at 1070. Applying this principle, the Sixth Circuit concluded that a plan administrator is required under ERISA Section 104(b)(4) to furnish participants with a plan's actuarial valuation report and a written calculation procedure showing how a participant's benefits are calculated under a plan. Because the preparation of an actuarial report is required by ERISA, the court reasoned, such reports are "indispensable to the operation of the plan" and "as such are instruments under which the plan is . . . operated." *Id.*

In *Hughes,* the in banc Ninth Circuit held that "[t]he relevant documents which Section 104(b)(4) requires disclosed are those documents that provide individual participants with information about the plan and benefits." 72 F.3d at 690. The Ninth Circuit cited *Werner v. Morgan Equip. Co.*, 15 Employee Benefit Cas. (BNA) 2295, 2301 (N.D. Cal.1992) as an example of the correct application of Section 104(b)(4). In the

latter case, the court held that a stock appraisal report -- one of the documents that Petitioners in this case had requested -- was an instrument under which the plan was established or operated because the plan at issue measured benefits by the value of stock. The reasoning of the in banc Ninth Circuit clearly would require disclosure of supporting financial information.

### B. Participants in Plans Located in the Fourth Circuit Will Be Denied Access to Information Necessary to Determine Whether Their Benefits Are Properly Calculated, Their Plan is Insured Against the Dishonesty of Those Who Handle the Plan's Assets or They Are Complying with the Applicable Tax Law

The Fourth Circuit's decision denies plan participants access to documents that are critical to the operation of employee benefit plans. Without the ESOP stock appraisal report and the documents upon which it is based, plan participants have no way to determine whether they are receiving the full amount of the retirement benefits promised to them under the plan. Without the bonding policy and the IRS determination letter, they cannot be assured that their retirement benefits are insured against the dishonesty of those handling the plan's assets or that the plan participants are not subject to current income tax on contributions made to their plan.

No document, other than the plan document itself, is more crucial to the operation of an ESOP than the stock appraisal report. It is this document that establishes the value of the ESOP stock and that stock makes up the participant's retirement benefit. Any error in the appraisal impacts directly on the participant's retirement benefits. ESOPs are almost entirely invested in the sponsoring employer's stock. Thus, any reduction in the price of the sponsoring employer's stock reduces ESOP participants' benefits by a corresponding

percentage. Appendix at 29a-30a. (Michael, J. dissenting) and citations therein.

Participant oversight is crucial because a sponsoring employer has the ability to manipulate the stock price to its financial benefit. It is the appraisal report that establishes the price of the stock in purchase and sale transactions between the sponsoring employer and the ESOP. As the dissent below correctly recognized, access to an ESOP appraisal and its supporting financial information is especially important given "the inherent conflict of interest between the ESOP and the sponsor's corporation, both of which are buyers and sellers of the corporation's shares." If participants do not have access to this information, there will be no check on the accuracy of the appraisal. Appendix at 31a-32a.

An ESOP provides a multitude of benefits to sponsoring employers. And, it exposes participants to the risk of non-diversification of investments as well as manipulation of the stock price by the employer. In light of the significant potential for abuse, participants must have access to the information necessary to ensure, at a minimum, that the stock in their account -- their retirement benefit under the plan -- is accurately valued. Appendix at 32a.

## CONCLUSION

The Fourth Circuit's holding that disclosure under Sections 104(b)(4) and 404(a)(1)(A) excludes such basic plan documents as the appraisal used to determine the value of participants benefits, the IRS determination letter and bonding policy conflicts with the holdings of the Sixth and Ninth Circuits. Furthermore, the Sixth and Ninth Circuits do not agree on the appropriate standard. Unless this Court resolves this morass and defines the obligations of disclosure to participants under Sections 104(b)(4) and 404(a)(1)(A), plan administrators, sponsoring employers, trustees, and participants

will have no idea what documents must be provided. And, more importantly, plan participants will be unable to verify whether their benefit accounts are honestly or fairly valued.

Respectfully Submitted,

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